

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

BRONX LOBSTER PLACE, LLC

Employer,

and

Case No. 02-RC-191753

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 15

Petitioner.

**EMPLOYER BRONX LOBSTER PLACE'S REQUEST FOR
REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND
CERTIFICATION OF REPRESENTATIVE**

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EMPLOYER'S REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, Bronx Lobster Place, LLC ("Employer" or "Lobster Place") respectfully submits this Request for Review of the Regional Director's Decision and Certification of Representative (the "Decision") in the above-referenced case.

The Regional Director held that the Employer's Objections should be overruled despite the fact that: (1) the polls for the election were closed for approximately twenty minutes during the short 1.5 hour afternoon voting session; (2) four eligible employees did not vote in the election that was decided by one vote; (3) there was evidence of electioneering by the Union's observer; and (4) the Board Agent failed to follow numerous Board protocols in conducting the election. Specifically, Review should be granted because:

(1) the Regional Director ignored the clear weight of Board authority by ruling that the failure to keep the polls open during the scheduled voting times did not warrant overturning the election; and

(2) the Regional Director refused to consider that the Union's Observer took a ten-minute break during the afternoon voting session and provided improper guidance to the final voter.

These factual and legal errors warrant overturning the Decision, and are described in detail below.

I. Background

The International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 15 ("Petitioner" or "Union") filed an election petition in this matter on January 24, 2017. A stipulated election agreement was reached on February 1, 2017, and an election was held on

February 24, 2017. There were at least 31 eligible voters for the election. 14 ballots were cast for the Petitioner and 12 ballots were cast against the Petitioner. The Petitioner challenged one vote, which was never resolved and 4 individuals did not vote. Therefore, if the challenged vote had been against Union representation, the results of this election could have been altered by just one of the four individuals who did not vote.

On March 2, 2017, Lobster Place filed timely objections to the election. The Employer's Objection 1 alleged that a defaced Official Notice of Election/sample ballot that was checked in the "YES" box had led employees to believe the Board was biased in favor of the Petitioner, compromising the neutrality of the election process.

Employer's Objection 2 alleged the Board Agent unilaterally shortened the agreed upon polling time, which disenfranchised eligible voters and interfered with the election process. Specifically, it alleged that the Board Agent was late for the afternoon polling session and the session began seven minutes after the scheduled time.

On April 10, 2017, a hearing was held regarding the objections before Hearing Officer Henry J. Powell (the "Hearing Officer"). The Hearing Officer recommended that the objections be overruled and that a Certification of Representation be issued; on October 20, 2017, the Regional Director agreed with the Hearing Officer's Report and issued the Decision overruling the Employer's objections.

ARGUMENT

POINT I

THE REGIONAL DIRECTOR ERRED IN OVERRULING THE EMPLOYER'S OBJECTIONS DESPITE THE FACT THAT THE POLLS WERE NOT OPEN FOR THE ENTIRE SCHEDULED SESSION

The Regional Director engaged in clear error on two significant issues relating to the duration of time the polls remained open. First, the Decision is inconsistent with Board precedent. Second, the Regional Director refused to consider the ten-minute break taken by the Union's Observer, which required the polls to be closed for an additional ten minutes during the afternoon session.

A. The Regional Director Acknowledged, Yet Ignored Controlling Board Authority

In the Decision, the Regional Director cites ten cases supporting the *Employer's* position. These cases held that when polls are not opened for their scheduled times, the Board will set aside an election when eligible voters who were *possibly* disenfranchised could have affected the election. These cases also hold that whether or not the eligible voters were in fact disenfranchised is of no moment. (Decision, p. 8-9). There is no dispute that the afternoon session was shortened as the Board Agent arrived late and the polls opened at least seven minutes late. There is also no dispute that at least four employees did not vote.

Among the ten decisions that support the Employer's position, the Regional Director cites to *Wolverine Dispatch*, 321 NLRB 796 (1996), which bears nearly identical facts to the case at issue. In *Wolverine Dispatch*, the Board Agent left the polling area unattended for several minutes and there were four employees who did not vote who could have affected the result. Despite the absence of any evidence that any of the four employees were in fact disenfranchised, the Board in *Wolverine Dispatch* overturned the election because of (1) the

possibility that they may have been disenfranchised and (2) their votes could have impacted the result of the election.

In contrast to the ten decisions cited in favor of the Employer's position, the Regional Director, cites to only one case, *Arbors at New Castle*, 347 NLRB 544, 545 (2006), in support of his Decision. (Regional Director, p. 9). In that case, the parties had stipulated that the five employees who did not vote had never appeared at the polls during the scheduled polling hours. Based on this stipulation, the Board concluded that the five employees did not appear at or near the polling area and could not possibly have been disenfranchised. *Id.* Here, no such stipulation exists and the record evidence does not establish the whereabouts of the four employees who did not vote. Based on the record evidence, it is possible that one or all four of the employees may have approached the polling area intending to vote, but were unable to do so because no signs relating to the election were visible or there did not appear to be an election taking place in the vicinity. As was the case in *Wolverine Dispatch*, the Employer need not prove that those who did not vote were in fact disenfranchised. Because only one of these additional votes could have changed the result of the election, Board authority requires the Decision be overturned.

B. The Board's Refusal to Consider that the Afternoon Polling Session Was Cut Short By Ten Additional Minutes Further Compounds its Error

As noted, this election involved a short 1.5 hour voting session that was scheduled from 12:00 to 1:30 in the afternoon. There is no dispute that the Board Agent arrived late and the polls were not opened until at least 12:07. The late opening of the polls was specifically stated in Employer's Objection 2. In addition, at the hearing, a witness testified that the Union's Observer left the polling area unaccompanied for about ten minutes. Therefore, based on the Board's rules which require the Union's Observer to check off a name on the voter list, no employee could have voted during that time.

However, the Regional Director erroneously refused to consider evidence of the ten-minute break on the basis that (1) the ten-minute break was not reasonably encompassed within Employer's Objection 2; and (2) the Petitioner was unable to litigate the issue at the hearing. (Decision, p. 4).¹

Employer's Objection 2 concerns the opening and closing of the polls, and evidence of the ten-minute break goes directly to that issue; it therefore was reasonably encompassed within Objection 2. Further, the Hearing Officer specifically told Petitioner's Representative that he would be "allowed to cross-examine on [the ten-minute break]" (Tr. 29: 18-20), the Petitioner confirmed that he was permitted to cross-examine the witness on the issue, asking "You want me to cross-examine now?," the Petitioner then proceeded to do so. (Tr. 29: 24-25 – Tr. 30: 1-19). In addition, the Petitioner addressed the ten-minute break in its closing argument and brief in Opposition the Employer's Exceptions to the Decision of the Hearing Officer, at p. 9, Fn. 2; therefore the issue was in fact litigated at the hearing. Based on *Pacific Beach Hotel*, this evidence should have been considered.

The Regional Director's refusal to consider the fact that the polls were closed for ten minutes while the Union's Observer took a break was error.

The afternoon polling session was supposed to be open for 1.5 hours. Because of the seven-minute delay and ten-minute break, the afternoon session was cut short by nearly 20%. The parties reached a stipulated agreement finding that an afternoon session of 1.5 hours was necessary to ensure voters had a chance to cast a ballot. Because the Board Agent allowed this

¹ Board law is clear that if an issue was litigated at the hearing, even if it was not specifically expressed in the objections, it should be considered. See *Pacific Beach Hotel*, 342 NLRB 327, 373 (2004) (considering evidence where party was cross-examined on the issue and conduct was addressed in briefs).

agreed-upon polling time to be cut short nearly 20%, and four individuals did not vote, the Decision and election should be overturned.

POINT II

THE REGIONAL DIRECTOR ERRED IN OVERRULING THE EMPLOYER'S FIRST OBJECTION RELATING TO THE APPEARANCE THAT THE BOARD FAVORED THE PETITIONER IN THE ELECTION

The Employer's first objection alleged that a defaced Notice of Election (the "Notice") undermined the integrity and neutrality of the election process by suggesting to employees that the Board favored the Petitioner. At the hearing, the Employer presented evidence that the "Yes" box on the Notice inside the room where the vote was taking place was marked with an "X" and that voters walked by the Notice on their way to cast their vote. (Tr. 13:13–15:1). That the defaced Notice was eventually replaced after the Board Agent became aware of the marking does not erase the fact that someone purposefully made the marking and that voters were required to walk by the Notice on their way to vote. Thus, it is possible that voters viewed the Notice—an official Notice of Election placed by the Board—as an indication that the Board favored the Petitioner in the election.

At the hearing, the Employer submitted further evidence that employees may have reasonably viewed the Board as favoring the Petitioner in this election because the Board Agent permitted the Union's Observer to disregard the Board's Instructions to Election Observers. Specifically, the Board Agent allowed the Union's Observer to (1) take a ten-minute unaccompanied break and (2) provide guidance to the final voter. Both of these actions are in clear violation of the Board's well-established casehandling rules and suggested impartiality.

The Board agent allowed the Union's Observer to instruct the final voter to vote yes or no. Notably, testimony indicated the Union's Observer may have emphasized the word yes. (Tr.

27:14-16). *See Brinks Inc.*, 331 NLRB 46 (2000) (improper communications by Board agent resulted in overturned election where election was particularly close). No matter the tone or inflection used by the Union's Observer, the Board Agent allowed the Union's Observer to provide critical guidance to the employee who was about to cast what turned out to be a potentially determinative vote. The Board Agent did not react in any way or tell the Union's Observer that his conduct was prohibited. (Tr. 26:14–27:16). The Board's Instructions to Election Observers, Form NLRB-722, which was provided to the Union's Observer in this matter, clearly states:

DO NOT:...

- Give any help to any voter. Only a Board Agent can assist the voter.
- Electioneer at any place during the hours of the election.

The Board's Rules for Election Observers are intended to avoid any appearance of partiality in the Election Process and the Board Agent here stood in silence as the Union's Observer violated the Board's rules. These rules are in place for a reason, and the Board Agent's and Union's Observer's conduct, particularly in light of the fact this could have been the determinative vote, should result in overturning the election.

The Board Agent also failed to comply with the Board's rules by allowing the Union's Observer to leave the polling place unaccompanied for approximately ten minutes. (Tr. 24:14–25:1, 26:3–9). The Board's Casehandling Manual provides at 11326.2:

Election observers may not electioneer during their hours of observer duty, whether at or away from the polling place. **In order to remove any possibilities of electioneering, an observer away from the polling place for any reason during his/her duty hours should be accompanied by observers representing the other parties.** Observers should not be permitted to engage in unnecessary conversation with incoming voters.

(emphasis added). The evidence shows the Board Agent failed to follow this protocol. Again, the Casehandling rules are in place to prevent partiality and/or electioneering by observers. Here, impartiality was destroyed when the Board Agent allowed the Union's Observer to leave the polling place unaccompanied as the Board Agent and the Employer's observer remained inside the room. Moreover, to allow the Union's Observer to ignore the Board's rules suggests the Board favored the Union over the Employer.

When considered together, the defaced Notice, allowing the Union's Observer to electioneer and/or provide guidance to an employee who was about to cast the determinative vote, and allowing the Union's Observer to leave the election area unaccompanied for approximately ten minutes, it is clear that the Board Agent's conduct may have signaled to employees that the Board favored the Petitioner in this election. In an election determined by just one vote, the defaced Notice, along with the Board Agent's and Union's Observer's conduct, were significant enough to warrant a new election.

According to the Regional Director, he could not consider the evidence of the Board Agent allowing the Union's Observer to (1) electioneer and/or provide guidance; and to (2) leave the polling place for ten minutes unaccompanied because they were not specifically alleged within the Employer's written objections. However, these allegations are encompassed by the first written objection because all allegations of Board partisanship speak directly to the underlying theory behind the first objection—the election process was compromised by the Board's actions, which suggested to employees that the Board favored the Petitioner.

In addition, as set forth above, these issues were subject to cross-examination at the hearing, and therefore, they should have been considered by the Regional Director. Here, the question of the ten-minute break and the electioneering conduct were specifically addressed by

Petitioner's Representative in his cross-examination. (Tr. 29: 24-25 – Tr. 30: 1-19) and in its opposition to the Employer's Exceptions. Because the *Pacific Beach* standard has been met, the Regional Director should have considered the implications of the Union's Observer's improper ten-minute break and the Union's Observer's prohibited communication with the final voter.

Proper consideration of these three incidents should result in the Decision being overturned.

CONCLUSION

Because the Regional Director's Decision contains clear legal and factual errors, the Board should grant review and set aside the Decision certifying the results of the election.

Dated: November 3, 2017

Respectfully submitted,
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CERTIFICATE OF SERVICE

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